

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Resolution No. L-436 Regarding New
Regulations Regarding Public Access to
Records of the California Public Utilities
Commission and Requests for Confidential
Treatment of Records.

Resolution No. L 436
Agenda Item # 11822
Date: January 24, 2013

**COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO ON
RESOLUTION NO. L-436 REGARDING THE DEVELOPMENT OF NEW
REGULATIONS REGARDING PUBLIC ACCESS TO RECORDS OF THE
CALIFORNIA PUBLIC UTILITIES COMMISSION AND REQUESTS
FOR CONFIDENTIAL TREATMENT OF RECORDS**

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I. INTRODUCTION

The City and County of San Francisco (“City”) submits these comments on Resolution L-436, the Proposed Resolution Regarding New Regulations Regarding Public Access to Records of the California Public Utilities Commission (“Commission”) and Requests for Confidential Treatment of Records (“Resolution”). The City commends the Commission’s efforts to make its records more accessible to the public and to limit the ability of regulated entities to obtain confidential treatment of records that should be open to the public. With the adoption of the Proposed Resolution at this time and General Order (“G.O.”) 66-D at a later date, the Commission will be taking a huge step towards ensuring that public records created by and/or filed with the Commission are accessible to the public as required by the California Public Records Act (“CPRA”).

II. THE PROPOSED RESOLUTION IMPLEMENTS THE CALIFORNIA PUBLIC RECORDS ACT IN A MANNER THAT COMPLIES WITH THE LAW AND POLICY OF THE STATE OF CALIFORNIA

A. The Purpose of the CPRA is to Make Government Records Available to the Public

The Legislature enacted the CPRA “for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies.”¹ The Legislature declared that such “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”²

Under the CPRA “[a]ll public records are subject to disclosure” unless the CPRA “expressly provides otherwise.”³ The definition of the term “public records” in the CPRA amply demonstrates its purpose: “‘Public records’ includes any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.”⁴

¹ *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-26.

² Gov. Code, § 6250.

³ *BRV, Inc v. Superior Court* (2006) 143 Cal.App.4th 742, 751.

⁴ Gov. Code, § 6252, subd. (e).

The CPRA limits an agency's authority to withhold a public record from disclosure to two circumstances. "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."⁵

B. The City Supports those Aspects of the Proposed Resolution that Eliminate Many of the Deficiencies in G.O. 66-C

The Proposed Resolution recognizes that the Commission's present regulations implementing the CPRA that are contained in G.O. 66-C are "outdated and cumbersome, and often delay rather than facilitate access to records."⁶ The Proposed Resolution corrects those deficiencies by treating all documents as public records and placing the burden on the filer to show that an exception to the CPRA applies.⁷ As further discussed below, the Proposed Resolution also eliminates some of the other aspects of G.O. 66-C that are not in accord with the CPRA. The City strongly supports those aspects of the Proposed Resolution.

1. The Proposed Resolution Ends the Practice of Utilities Relying on Public Utilities Code § 583 as a Basis for Confidential Treatment and Correctly Construes Both the Commission's Obligations and Authority under § 583

In G.O. 66-C, the Commission allows regulated entities to rely on Public Utilities Code § 583 to keep from public disclosure "[r]ecords or information of a confidential nature furnished to, or obtained by, the Commission."⁸ The Proposed Resolution correctly finds that Public Utilities Code § 583 "neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential."⁹ The Proposed Resolution then

⁵ Gov. Code, § 6255, subd. (a).

⁶ Proposed Resolution at 1.

⁷ Proposed Resolution at 1-2.

⁸ G.O. 66-C § 2.2, citing Public Utilities Code §§ 583, 3709, 5228.

⁹ Proposed Resolution at 6, quoting D.91-12-019, *Re Southern California Edison Company* (1991) 42 Cal.P.U.C.2d 298, 391.

properly rejects the Commission’s prior citation to § 583 in G.O. 66-C to establish an “as an example of a statute identifying records of a confidential nature.”¹⁰

A number of public utilities commented that the Proposed Resolution incorrectly construes the Commission’s obligations and authority under § 583.” They contend that § 583 establishes a “statutory presumption of confidentiality.”¹¹ They argue that “§ 583 bars the CPUC from issuing decisions adopting regulations providing that specific classes of records or information furnished by utilities . . . are available to the public.”¹² They further assert that these determinations must be made “through specific orders.”¹³

The Proposed Resolution properly rejects these arguments.¹⁴ As the Proposed Resolution correctly recognizes, the Commission has found in “numerous resolutions” that nothing in § 583 establishes a “substantive barrier to disclosure.”¹⁵ Moreover, in § 583 the Legislature gave the Commission “unrestricted” authority to determine whether information furnished by utilities should be “open to the public.”¹⁶ This includes the authority to identify “broad classes” of documents that are public records subject to disclosure.¹⁷

2. The Proposed Resolution Ends the Practice of Utilities Claiming Confidentiality Based on Concerns that Public Disclosure Would Place Them at an Unfair Business Disadvantage

In G.O. 66-C, the Commission allows public utilities to obtain confidential treatment of “[r]eports, records, and information requested or required by the Commission” if they claim that revealing those documents would place them “at an *unfair business disadvantage*.”¹⁸ As noted in the Proposed Resolution, this provision “makes it easy for utilities to claim confidentiality.”¹⁹

¹⁰ Proposed Resolution at 5.

¹¹ Proposed Resolution at 45.

¹² Proposed Resolution at 44.

¹³ Proposed Resolution at 44-45.

¹⁴ Proposed Resolution at 45-49.

¹⁵ Proposed Resolution at 47.

¹⁶ Proposed Resolution at 46, *quoting* D.06-06-066, as modified in D.07-05-032, at 27.

¹⁷ Proposed Resolution at 45.

¹⁸ G.O. 66-C, § 2.2(b), *emphasis added*.

¹⁹ Proposed Resolution at 5.

In the Proposed Resolution, the Commission properly recognizes that a regulated entity may only claim that documents provided to the Commission are confidential if the utility can show that the “documents are subject to a CPRA exemption or other provision of law prohibiting or limiting disclosure.”²⁰ As the Proposed Resolution correctly states, there is no CPRA exemption that matches the Commission’s “unfair business disadvantage.”²¹

If the Commission were to adopt the Proposed Resolution, the Commission would eliminate one of the most significant deficiencies in its compliance with the CPRA as set forth in G.O. 66-C. No longer will the Commission allow utilities to file virtually any document they want as confidential based on vague assertions of an “unfair business disadvantage.”

Predictably, some utilities asked that the Commission preserve this aspect of G.O. 66-C, because the Commission has made this a “well-established” exception to the CPRA.²² In the Proposed Resolution, the Commission rejects that request, finding that the “CPRA offers sufficient exemptions to protect market-sensitive information and limit the disclosure of information that would place businesses at an unfair disadvantage; it just requires a careful balancing of interests and reliance on different authority for confidential treatment.”²³

The Proposed Resolution, however, does not resolve this issue. The Proposed Resolution recognizes that utilities might have legitimate concerns over the disclosure of “market sensitive information” and notes, on the one hand that the “public may be harmed by the disclosure of sensitive information.” On the other hand, “[p]ublic access to information may result in more effective competition by those who can use the information to tailor proposed generation projects.”²⁴ As a result, the Proposed Resolution directs Commission staff to explore the

²⁰ Proposed Resolution at 1-2.

²¹ Proposed Resolution at 8.

²² Proposed Resolution at 63.

²³ Proposed Resolution at 71.

²⁴ Proposed Resolution at 69.

“boundaries of any substitute for the G.O. 66-C exemption for information that may place the provider at a competitive disadvantage.”²⁵

The City is concerned that these discussions could lead to a substitute for the “unfair business disadvantage” exception that is just as broad as the one that is presently contained in G.O. 66-C and that the Proposed Resolution rejects. In leading these discussions, Commission staff must remain cognizant of the findings in this Proposed Resolution that a document is a public record unless it is subject to a specific CPRA exemption or privilege. The Commission cannot create new exemptions or privileges that would allow utilities to keep these types of documents confidential.

3. The Proposed Resolution Properly Places the Burden of Showing that a Document is Confidential on the Filer

Currently, G.O. 66-C places the burden on the party seeking disclosure of a document deemed confidential to state “the reasons why these records should be disclosed.” Not only is this contrary to the CPRA, it also establishes a nearly impossible burden on persons seeking disclosure of public records.

The Proposed Resolution corrects this deficiency by placing the burden of showing that a document is confidential on the filer. Under the Proposed Resolution, the party seeking confidential treatment “bears the burden of demonstrating that such treatment is both authorized and appropriate.”²⁶ The filer must show that confidential treatment is permitted by a CPRA exemption.²⁷

The Proposed Resolution then carefully identifies all of the proposed exemptions that may be relied upon to obtain a Commission order that a document is confidential.²⁸ As required by the CPRA, a document is public unless the filer shows, and the Commission agrees, that one of these exemptions applies.

²⁵ Proposed Resolution at 71.

²⁶ Proposed Resolution at 9.

²⁷ Proposed Resolution, Conclusion of Law 10, citing Gov’t Code § 6255.

²⁸ See Proposed Resolution, Conclusions of Law 11-16, 22-44.

4. The Proposed Resolution Makes Records of the Commission’s Audits and Investigations Available to the Public on a Routine Basis

In G.O. 66-C, the Commission prohibits public disclosure of the “[r]ecords of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.”²⁹ As noted in the Proposed Resolution, this provision “often unnecessarily delays disclosure of records of completed safety investigations.”³⁰ The Proposed Resolution properly rejects this approach in favor of broad public access to these records.

The Proposed Resolution authorizes the disclosure of “records of a completed safety investigation on a routine basis.”³¹ The Proposed Resolution directs Commission staff to develop “an informative safety information portal” on the Commission’s website where the public could obtain access to the Commission’s safety-related documents.³²

III. THE CITY GENERALLY SUPPORTS THE PROPOSED RESOLUTION’S PROCESS FOR MAKING CPRA DETERMINATIONS

As the Proposed Resolution recognizes, the process contained in the first draft of the Proposed Resolution and G.O. 66-D was unduly cumbersome and confusing.³³ The revised Proposed Resolution and revised draft of G.O. 66-D includes significant changes to the process. As discussed below, the City generally supports the process for the Commission’s consideration of requests for confidential treatment that is contained in the revised draft of G.O. 66-D.³⁴

The City supports the procedure whereby a request for confidential treatment would be reviewed by the appropriate Commission division and/or the Public Records Office (“PRO”).³⁵ The City agrees that the Commission may delegate this authority to staff.³⁶

²⁹ G.O. 66-C, § 2.2(a).

³⁰ Proposed Resolution at 7.

³¹ Proposed Resolution at 7.

³² Proposed Resolution at 20.

³³ See Proposed Resolution at 95-97.

³⁴ The City understands that this process will be refined in the workshops.

³⁵ Draft G.O. 66-D, § 3.2.

³⁶ See Proposed Resolution at 80-88.

The City also agrees with the approach of the Commission having a standing resolution on its calendar each month in which the Commission could ratify or reject confidentiality determinations made by the PRO.³⁷ A PRO resolution would both provide a vehicle for a requesting party to challenge a staff determination that a document is a public record and enable interested persons to protest a Commission determination that a document is confidential.

The Proposed Resolution suggests that utilities could submit an application to the PRO for a determination that certain “classes of records a regulated entity routinely files with or otherwise submits to the CPUC” are either public or confidential.³⁸ The City recognizes the administrative efficiency of this approach, but is concerned that identifying classes of confidential documents could swallow the rule that all documents filed with the Commission are public records.

The City also supports the use of monthly compliance advice letters for utilities to report each request for confidential treatment submitted and the public or confidential status designations approved during the period covered by the report.³⁹ The advice letter process contained in G.O. 96-B would provide an opportunity for public notice and protests related to such requests and designations, and a procedure for Commission disposition of such requests, designations, and protests.⁴⁰

IV. THE CITY SUPPORTS THE PROPOSED RESOLUTION’S DETERMINATION THAT THE COMMISSION MAY SHARE CONFIDENTIAL DOCUMENTS WITH OTHER GOVERNMENTAL AGENCIES

The Proposed Resolution correctly states that under Government Code § 6254.5, subd. (e) the Commission may share confidential information with other governmental entities without waiving the right to assert that such information is exempt from disclosure under the CPRA,

³⁷ Draft G.O. 66-D, § 3.2.2.

³⁸ Draft G.O. 66-D, § 3.1.2.2.

³⁹ Draft G.O. 66-D, § 3.1.2.3.

⁴⁰ It is unclear whether this process would be in addition to or in lieu of the PRO’s standing resolution process. (See Proposed Resolution at 96-97 [suggesting that the Commission might incorporate the utilities’ advice letters into the PRO resolution].)

provided that the sharing is pursuant to a confidentiality agreement.⁴¹ The City agrees with the Proposed Resolution that under certain circumstances the use of such an agreement could enable the Commission and other government agencies to work cooperatively to protect the public interest. This could be especially true where the Commission is conducting a safety-related investigation that concerns utility facilities in local jurisdictions.

V. THE CITY SUPPORTS THE PROPOSED RESOLUTION’S DIRECTION TO STAFF TO USE THE COMMISSION’S WEBSITE TO MAKE PUBLIC RECORDS MORE ACCESSIBLE

The City supports the Proposed Resolution’s direction that Commission staff work to develop: (i) a publicly accessible database of requests for confidential treatment;⁴² (ii) a publicly accessible “Docket Card” system for tracking advice letters and related documents;⁴³ and (iii) a “safety information portal” to post information regarding the Commission’s safety jurisdiction and activities and provide public access to safety and reliability-related records.⁴⁴

VI. CONCLUSION

The City strongly supports the Proposed Resolution and asks that the Commission move quickly to approve the Proposed Resolution, convene workshops, and draft a new version of General Order 66-D that can then be approved by the Commission.

Dated: January 11, 2013

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⁴¹ Proposed Resolution at 17, Finding of Fact 17, Conclusion of Law 20, and Ordering Paragraph 8.

⁴² Proposed Resolution at 104.

⁴³ Conclusion of Law 4.

⁴⁴ Conclusion of Law 5.